In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No.

GUS FARBER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered July 27, 1940, and is reported in ..... Federal (2d) ....., and is set forth in full in the record (R. 210).

II.

JURISDICTION.

1. The jurisdiction of the Supreme Court of the United States to issue the writ of certiorari herein prayed for is invoked under Judicial Code Section 240 (a), as amended by the Act of February 13, 1925, 43 Stat. L. 938 (28 U.S.C. 347 (a)).

2. The judgment which is sought to be reviewed was entered by the United States Circuit Court of Appeals, for the Ninth Circuit, on July 27, 1940 (R. 223). A petition by petitioner for a rehearing (within the time allowed by the rules of said Circuit Court) was denied on September 16, 1940 (R. 224).

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" in the petition and in the interest of brevity, the statement is not to be repeated at this point.

IV.

SPECIFICATION OF ERRORS.

A. The United States Circuit Court of Appeals for the Ninth Circuit erred in holding that the trial Court properly overruled petitioner's demurrer.

B. The said Circuit Court erred in holding that the Gold Reserve Act of 1934 did not repeal the gold coin clauses of Executive Order 6260, as amended.

C. The said Circuit Court erred in deciding in effect that Section 3 of the 1934 Gold Reserve Act permits the Secretary of the Treasury to make only such regulations thereunder which do not conflict with Executive Order 6260, as amended.

D. The said Circuit Court erred in that its decision has the effect of legislating out of existence at least some of the permissive portions of Section 3 of the 1934 Gold Reserve Act and Section 20 of the Regulations issued by the Secretary of the Treasury thereunder.

E. The said Circuit Court erred in that its decision in effect holds that Section 20 of the Regulations issued by the Secretary of the Treasury under the 1934 Gold Reserve Act, in so far as it permits persons not collectors of rare coins to acquire, hold and dispose of gold coins of recognized special value to collectors of rare and unusual coins without a permit, is of no valid force and effect where the acquiring, holding or disposing is done wilfully.

F. The said Circuit Court erred in that its decision impliedly declares that the delegation of authority to the President upon the subject of gold coin under the Trading With the Enemy Act of 1917, as amended, was not an unconstitutional delegation of legislative power.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A. The Circuit Court of Appeals erred in holding that the first count of the indictment constituted a public offense against petitioner, for the reason that the law upon which said count of the indictment was based was repealed by the Gold Reserve Act of 1934 prior to the date alleged in the indictment.

Point B. The said Circuit Court of Appeals erred in holding that the first count of the indictment states a public offense, for the reason that the Act which authorized the President to prohibit under penalty of fine or imprisonment, or both, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting or earmarking of gold or silver coin or bullion or currency, by any person within the United States, is an unconstitutional delegation of legislative power.

POINT A.

THE CRIME OF ACQUIRING GOLD COIN, IF IT EVER EXISTED, WAS ABOLISHED BY THE GOLD RESERVE ACT OF 1934 PRIOR TO THE TIME ALLEGED IN THE INDICTMENT.

The crime of illegally *acquiring* gold coin, if there be any, was *first created* by Presidential regulation, Executive Order 6260. The original Executive Order 6260 was issued by the President on August 28, 1933,

and is set forth, so far as pertinent, in Appendix pp. 22-23. (The amendment thereto was effected on January 20, 1934, by Executive Order 6556 (App. 29)).

Executive Order 6260, as amended, upon which said first count is based, so far as pertinent, reads as follows:

> "Sec. 4. No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin * * * except under license therefor issued pursuant to this Executive Order, provided * * * that collectors of rare and unusual coin may acquire from one another and hold without necessity of obtaining a license therefor, gold coin having a recognized special value to collectors of rare and unusual coin * * *."

The only statute which ever purported to authorize the promulgation of Executive Order 6260, as amended or otherwise, was that which created the March 9, 1933 amendment to Section 5 (b) of the "Trading With the Enemy Act" of 1917, 40 Stat. L. 411 (App. 1). The amendment of March 9, 1933 was contained in an act entitled "An Act to Provide Relief in the Existing National Emergency in Banking, and for Other Purposes," 48 Stat. L. 1 (App. 12).

The said amendment amended Section 5 (b), so far as pertinent, as follows:

> "(b) *During time of war or during any other period of national emergency declared by the President,* the President may, through any agency

> that he may designate, or otherwise, * * * regulate or prohibit, under such rules and regulations as he may prescribe by means of license or otherwise, any transactions in foreign exchange, *transfers of credit between or payments by banking institutions as defined by the President,* and export, *hoarding, melting,* or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof; * * *. *Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association or corporation.*" (Italics ours and show that which was supplied by said amendment.)

It was under the authority vested in him by the Trading With the Enemy Act as it stood prior to amendment that the President declared the "Bank Holiday" (Executive Order 2039 (App. 8)), made on March 6, 1933, just three days before the enactment of the 1933 amendment.

We shall hereinafter refer to Executive Order 6260, as amended, as the First Regulation and to the "Trading With the Enemy Act" of 1917, as amended, as the First Act.

The Gold Reserve Act of 1934, 48 Stat. L. 337 (App. 35), was enacted January 30, 1934. The first section of said Act is numbered and entitled, "Section 2." It gives the United States title to all gold in any form held by the Federal Reserve Bank and it amends by express language certain paragraphs of the Federal Reserve Act. The remaining clauses of the Gold Reserve Act of 1934 which embrace the subject of gold coin, so far as material are as follows:

> "Section 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted, or treated, imported, exported, or earmarked: * * * gold in any form may be acquired, transported, melted, or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. * * *
>
> Section 4. Any gold withheld, acquired, transported, melted, or treated, imported, exported, or earmarked or held in custody, in violation of this Act, or of any regulations issued hereunder, or license issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act, or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of gold in respect of which such failure occurred."

> "Section 17. All acts and parts of acts inconsistent with any of the provisions of this Act are hereby repealed." (Approved January 30, 1934.)

We shall hereinafter refer to the Gold Reserve Act of 1934 as the Second Act.

The Second Act clearly shows, first, that a violation of the Second Act is not a criminal offense; and second, that the power which had been theretofore conferred upon the President by the First Act upon the subject of gold coin was given to the Secretary of the Treasury by the Second Act. The power and jurisdiction to *make* the regulations under the Second Act were vested wholly and exclusively in the Secretary of the Treasury, the right to *initiate* such regulations having been thereby removed from the President and lodged with the Secretary of the Treasury.

A comparison of the First Act and the Second Act upon the subject of gold coin will also reveal that the language in Sections 3 and 4 of the Second Act is equally as comprehensive as the language used in the First Act. It is true that the word "hoarding" is not contained in the Second Act, but it is fully covered by the words which are employed in Sections 3 and 4 of the Second Act. The Second Act uses the words "withholding," "hold," "acquire," "transport," "mutilate" etc. These words, we believe, are of sufficient scope to cover every possible act connected with "hoarding" which word has been defined in *Merritt v. U. S.*, 264 Fed. 870, reversed upon confession of error by the Solicitor General, 255 U.S. 579, 65 L. Ed. 795. The language employed in the Second Act

is therefore all-embracing. The subject matter with reference to gold coin is therefore identical in each of the two Acts.

The set of regulations issued under the Second Act by the Secretary of the Treasury with the President's approval is entitled "Provisional Regulations issued under the Gold Reserve Act of 1934" (App. 30). The Court will take judicial notice that this set of regulations was widely distributed in pamphlet form to the general public and that no reference to the First Regulation appeared therein. The pertinent portion of said set of regulations is Section 20, which as far as material, provides as follows:

> "Gold coin of recognized special value to collectors of rare and unusual coins * * * may be acquired and held, transported within the United States, imported, or held in custody for domestic account without the necessity of holding a license therefor."

This regulation we shall hereinafter refer to as the Second Regulation.

It is significant that the Second Regulation does not prescribe that those dealing in rare and unusual coins without a license need be collectors. That the omission to thus prescribe was a deliberate one is obvious from the language employed in the various executive orders shown in the appendix. The first question to be decided upon this appeal is, How much, if any, of the First Regulation falls within Section 17 of the Second Act? Or, putting it another way, Is there any inconsistency between the First Regu-

lation and the Second Regulation as to the subject matter alleged in the first count of the indictment? Petitioner contends that the said Regulations are inconsistent and that therefore Section 17 of the Second Act, notwithstanding the provisions in Section 13 of said Act, did by the declaration of repeal declared therein effectively destroy the power to criminally prosecute under the facts alleged in the first count of the indictment.

Whether or not, as contended by appellant and denied by the Circuit Court, the Second Act (Sections 3 and 4), together with the Second Regulation operated to repeal the gold coin portion of the First Act and the First Regulation, it is apparent that the Second Act has permissive features in it quite beyond the scope of the First Act. Due entirely to the authorization contained in the Second Regulation it is no longer necessary for anyone acquiring or holding gold coin of recognized special value to collectors of rare and unusual coins to hold a license for its acquisition or disposal. The record, beyond any question of doubt, conclusively establishes that the gold coin involved in the instant case had a value, beyond their gold content, to collectors of rare and unusual coins. The opinion of the Circuit Court, however, in holding that the appellant is guilty of the offense charged in the indictment under the provisions of the First Act and the First Regulation simply refused to recognize the right of the appellant to acquire and dispose of such gold coins under the permissive portions of the Second Regulation. In disposing of appellant's

contention that the gold coin in question being rare and unusual coins having a special value to collectors and therefore squarely within the permissive portions of the Second Regulation, the opinion merely states in effect that the indictment was under the First Act and that with reference to these particular coins and their acquisition or disposal the Second Act and Second Regulation were not a repeal of the gold coin portion of the First Regulation.

If the opinion of the Circuit Court is correct, it simply means that the Second Regulation is of no force and effect for the following reasons:

The Second Regulation, which is totally silent upon the question of intent, permits a collector to acquire gold coin of the recognized special value from any source at his command without a license and it permits any person not a collector to acquire from a collector or other person gold coin of such recognized value. Thus, the effect of the decision of the Circuit Court is to place said persons, who *wilfully* acquire gold coin of such recognized value in the position of having violated the First Regulation and subject to criminal prosecution therefor despite the express language used in the Second Regulation. The effect of the decision therefore is to legislate into the Second Regulation a non-existent proviso. The decision by thus curbing the will of the Secretary of the Treasury legislates out of existence a part of the permissive portions of the Second Regulation as well as the authority therefor contained in the Second Act. The decision leaves the Secretary of the Treasury without

power to make any regulation inconsistent with the First Regulation. The Second Act places no limitation upon the discretion of the Secretary of the Treasury in the making of the regulations. There is nothing in the Second Regulation which excepts persons, who without a license *wilfully* acquire such gold coins. It appears therefore that if the Second Regulation contains no such exception we then have a situation where a decidedly definite inconsistency exists between the First Regulation and the Second Regulation. This inconsistency is that which is designated by Section 17 of the Second Act and the First Regulation must therefore be deemed to have been repealed.

U. S. v. Yuginovich, 256 U.S. 450, 65 L. Ed. 1043, cited with approval in *U. S. v. Staffof,* 260 U. S. 477, 479-480, 67 L. Ed. 358, 360-361;
U. S. v. Tynen, 11 Wall. 88, 20 L. Ed. 153.

In the *Yuginovich* case, supra, the defendant was indicted for defrauding the government by not paying the tax on the distilling of spirits. The defense interposed a motion to quash on the ground that the 19th Amendment and the Volstead Law, which in general, made the manufacturing, possession, etc. of intoxicating liquors illegal, and provided a penalty therefor, repealed the former law. The first sentence of the Volstead Act, Section 35, repealed all prior acts to the extent of their inconsistency with the National Prohibition Act. A clause appearing at the end of said section provided:

"* * * nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

The Supreme Court in holding that the former laws were nevertheless repealed, said in 256 U.S. 450, at page 463:

"It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States v. Tynen,* 11 Wall. 88, 20 L. Ed. 153. In construing penal statutes, it is the rule that later enactments repeal former ones covering practically the same acts, but fixing a lesser penalty. The concluding phrase of Section 35, by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the Constitutional provisions contained in the 18th Amendment, and in view of the provisions of the Volstead Act intended to make that amendment effective."

In the *Tynen* case, the later enacted statute contained neither a saving clause nor a repealing clause.

THE SAVING CLAUSE INDICATES INTENT TO REPEAL FIRST REGULATION.

Section 13 of the Second Act provides (App. 38):

"All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury, under the Act of March 9, 1935, or under Section 43

or Section 45 of Title III of the Act of May 12, 1933, are hereby approved, ratified, and confirmed."

A similar clause in the First Act, Section 1 (App. 12, Sec. 1), went still further by ratifying orders, etc., "thereafter" made. No attempt was made to do that in Section 13, supra. It is thus apparent, by the omission to go that far in Section 13 of the Second Act, that it was not intended by Congress that the Second Act do so. Congress only intended to signify its approval of the actions *theretofore* taken by the President under the First Act. That it was not intended by Congress to continue in force the pre-existing power and authority of the President is therefore quite clearly indicated by the language employed in the Saving Clause in the Second Act.

IDLE LEGISLATION WOULD RESULT IF OTHER CONSTRUCTION APPLIED.

If it were intended that the pre-existing Presidential authority still continue, it would not have been necessary to enact Section 3 of the Second Act in order to delegate to the Secretary of the Treasury the power to make regulations on the subject. The President acting under the First Act could have delegated to the Secretary of the Treasury, under the power expressly vested in him by said Act so to do, all legal power necessary to enable the Secretary of the Treasury to make the Second Regulation. The fact is that similar delegation of power upon related subjects had already been effected by Presidential

proclamations and executive orders made pursuant to the First Act. Some of these proclamations and executive orders appear in the appendix, pp. 8, 14, 16, 23, 24 and 25.

Each of these proclamations and orders was made prior to the enactment of the Second Act and each delegated to the Secretary of the Treasury the power and jurisdiction to make regulations. Consequently the Second Act was not required in order to give the Secretary of the Treasury the necessary power.

If Section 3 of the Second Act was not necessary to give this power to the Secretary of the Treasury, the question then is, Why did Congress enact Section 3? Congress could not have intended to enact unnecessary legislation. By construing Section 13 so as to continue in force the First Regulation and hence the power already delegated therein to the Secretary of the Treasury by the President would be giving to Section 13 a construction which would make Section 3 meaningless and useless. A construction of that kind is not countenanced.

Bird v. U. S., 187 U.S. 118, 47 L. Ed. 100;
Winter v. Burrage, 103 U.S. 447, 456, 26 L. Ed. 405.

Section 3 must therefore mean exactly that which it so plainly and definitely states, that the Secretary of the Treasury *shall* make regulations without any restrictions whatsoever so far as the subject of gold coin is concerned excepting of course the requirement of Presidential approval.

CONGRESSIONAL HEARING ON THE SECOND ACT ALSO SHOWS A CONGRESSIONAL INTENT TO REPEAL THE FIRST REGULATION.

An examination of the records which were introduced at the hearing before the Committee on Banking and Currency, United States Senate, 73rd Congress (2nd Session) on the Second Act, S.2366 (App. 2), will disclose such intention.

The President's message (App. 3) and the Secretary of Treasury's statement to the committee (App. 5) clearly indicate not only that the Second Act originated with the President of the United States and the Secretary of the Treasury, but also that Section 13 was intended only as a ratification of actions taken prior to that time. The enactment of the bill without any change or modification strongly indicates not only that Congress was willing to cooperate with the President and the Secretary of the Treasury by doing their bidding but was also willing to adopt their intent as its own.

It appears from a comparison of all of the documents before the committee at said hearing that the President and the Secretary of the Treasury recognized that the language employed in the First Regulation (only collectors may acquire) hindered those persons who were not collectors from gratifying the desire to eventually become such. Such comparison also indicates that the President and the Secretary of the Treasury intended that this objection should be met and removed through the medium of the Second Regulation. The action taken by them in pro-

mulgating the Second Regulation when considered in the light of the language employed in executive orders previously made shows not only that there was no possible mistake about the language which was employed in the Second Regulation but it also shows that the President (by his written approval attached to the Second Regulation) and the Secretary of the Treasury (because he made said regulation) believed and intended that the Second Act was to actually transfer the power (to make all regulations) from the President to the Secretary of the Treasury. To construe the intent otherwise would be but to declare indirectly that the making of the Second Regulation was an idle act on the part of the Secretary of the Treasury.

FAILURE TO PROPOSE AMENDMENT TO FIRST REGULATION TO EFFECT DESIRED OBJECT IS SIGNIFICANT.

The repugnancy existing between the two Regulations could have been very easily avoided by merely amending the First Regulation so as to actually accomplish the purpose of the Second Regulation by either having the First Regulation provide merely that the Secretary of the Treasury may make regulations upon the subject or having it actually specify that gold coins of recognized and special value to collectors thereof may be acquired by any person without the necessity of obtaining a license therefor.

That this was not done is a strong circumstance which also points but to one conclusion, the conclusion that both the President and the Secretary of the Treasury intended that the First Act, at least

so far as it concerns gold coins, was being effectively repealed by Section 17 of the Second Act.

Thus the records of the Congressional hearing show an intent by Congress to repeal the gold coin portion of the First Regulation as well as the President's power to make regulations upon the subject.

Where, as here, such legislative intent is so patent upon the face of the documents which were before said Congressional committee, the *Yuginovich* case, supra, should unquestionably control the Court's construction of the later statute. In the instant case the gold coin provisions of the First Regulation should therefore be held to have been effectively repealed by Section 17 of the Second Act to such extent at least as concerns the subject matter alleged in the first count of the indictment.

We have thus shown that the Second Act should be held to have repealed the First Regulation (Executive Order 6260, as amended).

POINT B.

THE FIRST ACT IS UNCONSTITUTIONAL IN THAT IT DELEGATES TO THE PRESIDENT POWER TO LEGISLATE.

The portion of the First Act which purported to grant the President the power to "regulate or prohibit, under such rules and regulations as he may prescribe, by means of license or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting or

earmarking of gold or silver coin or bullion or currency" (Sec. 5 (b) of Act of March 9, 1933. (App. 12)), is an unconstitutional delegation of legislative power to the President.

The Constitution vests all legislative powers in the Congress (Const., Art. I, Par. 1). This power may not be delegated to the executive branch of the Government (*Panama Ref. Co. v. Ryan,* 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446; *Schechter v. United States,* 295 U.S. 495, 79 L. Ed. 1570).

It is said in the *Schechter* case, and also in the *Panama Ref. Co.* case, that Congress may perform its functions in laying down policies and establishing standards while leaving to the Executive within these prescribed limits the making of subordinate rules and the determination of facts upon which the policy, as declared by the Congress, is to apply.

Accordingly, we must examine Section 5 (b) of the First Act to determine whether there is any clear statement of "policy" or any statement therein established for the regulation or prohibition of the *acquisition* of gold coin. No policy nor any standard is fixed in this Act. The language of the Act states, "The President may * * * investigate, regulate or prohibit under such rules and regulations as he may prescribe. * * *"

Under what circumstances or state of facts shall he regulate, and under what circumstances or state of facts shall he prohibit the *acquisition* of gold coin?

We seek in vain to learn from the Act under what declared policy or what standard fixed by the Con-

gress the President may regulate or prohibit such acquisition. No policy is declared by the Congress. No standard is fixed by the Act. The President may or may not act solely in his own discretion. In other words, the President alone may decide whether or not the *acquisition* or the hoarding of any gold coin shall or shall not be a crime and punishable by the penal provisions of the statute.

It was held in the *Panama Ref. Co.* case, that one of the necessary steps to be taken by the President before he could exercise the authority to enact the prohibition was a finding of fact by the President and that the Act must so provide in order to be constitutional. There is no such provision in Section 5 (b) of the first Act. The President is not required to investigate and determine the existence or non-existence of facts or conditions before exercising the authority granted him by the Act to declare the *acquisition* of gold coin a crime. There is no statement or clause in the First Act which defines under what circumstances or conditions the *acquisition* of gold coin shall be prohibited. Such prohibition of *acquisition* of gold coin rests solely in the untrammeled will of the President and without any legislative restraint thereon.

Under the authority of the *Panama Ref. Co.* case and the *Schechter* case, we respectfully submit that the Act fails to define any policy, to set up any standard, and vests in the President alone the sole discretion as to whether or not the *acquisition* of gold coin shall or shall not be prohibited and shall or shall not

be a criminal offense. The Act, we submit therefore, is unconstitutional and is a delegation of legislative power to the President which is not authorized by the Constitution of the United States.

It is respectfully submitted that the writ should issue.

Dated, San Francisco, California,
October 11, 1940.

CHELLIS M. CARPENTER,
Attorney for Petitioner.

(Appendix Follows.)